

Shan P. Massand, Esq.  
 MCGUIREWOODS LLP  
 1251 Avenue of the Americas, 20<sup>th</sup> Floor  
 New York, NY 10020  
 (212) 548-2100  
 smassand@mcguirewoods.com

*Counsel for Defendant Bank of America, N.A.*

**UNITED STATES DISTRICT COURT  
 SOUTHERN DISTRICT OF NEW YORK**

	X	
DAVE SHOSTACK,	:	
	:	Case No. 1:19-cv-09162-RA
Plaintiff,	:	
	:	<b>DEFENDANT BANK OF</b>
v.	:	<b>AMERICA, N.A.’S ANSWER</b>
	:	<b>AND AFFIRMATIVE</b>
BANK OF AMERICA CORPORATION,	:	<b><u>DEFENSES</u></b>
	:	
Defendant.	:	
	:	
	X	

Defendant Bank of America, N.A. (“BANA”), erroneously sued herein as “Bank of America Corporation”<sup>1</sup>, states as follows for its Answer to the Summons with Endorsed Complaint (the “Complaint”) filed by Plaintiff Dave Shostack (“Plaintiff”). All allegations not specifically admitted herein are denied.

1. BANA denies the allegations in the Endorsed Complaint for “VIOLATIONS OF TCPA ACT FROM 8/23/19 PLACE OF OCCURRENCE: COMMACK, NY” and denies that Plaintiff is entitled to the requested relief.

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<sup>1</sup> Plaintiff names “Bank of America Corporation” as a defendant. Bank of America Corporation is a holding company, and does not make, own or service loans and, therefore, is not a proper party to this lawsuit. Therefore, it appears that Bank of America Corporation is not a proper party to this lawsuit in accordance with Fed. R. Civ. P. 17(b). Bank of America Corporation does not waive the right to contest its inclusion in this matter.

### **AFFIRMATIVE DEFENSES**

BANA states the following defenses to Plaintiff's Complaint, reserving the right to amend and/or supplement its responses to Plaintiff's allegations, as well as these avoidances and defenses, as additional information is obtained through the discovery process or otherwise.

#### **First Affirmative Defense**

Plaintiff has failed, in whole or in part, to state a claim upon which relief may be granted.

#### **Second Affirmative Defense**

BANA did not use an "automatic telephone dialing system" as defined by the TCPA to make the calls alleged in the Complaint, because BANA's equipment lacked the capacity to store, generate, or produce telephone numbers to be called using a random or sequential number generator.

#### **Third Affirmative Defense**

Plaintiff was not "charged" for the alleged telephone calls at issue and suffered no actual injury. Thus, Plaintiff lacks Article III standing. *Spokeo, Inc. v. Robins*, 136 S.Ct. 1540 (2016).

#### **Fourth Affirmative Defense**

Plaintiff does not qualify as a "called party" within the meaning of the TCPA.

#### **Fifth Affirmative Defense**

The Complaint is barred, in whole or in part, or subject to reduction by the doctrine of unclean hands.

#### **Sixth Affirmative Defense**

Plaintiff has suffered no damages resulting from any conduct on the part of BANA.

#### **Seventh Affirmative Defense**

BANA conducted itself in conformity with applicable laws and regulations, including those governing banking entities.

**Eighth Affirmative Defense**

Should Plaintiff establish liability of BANA, which BANA specifically denies, Plaintiff's injuries or damages are limited or barred due to Plaintiff's comparative fault.

**Ninth Affirmative Defense**

Plaintiff's claims may be barred by any or all of the affirmative defenses contemplated by Rule 8(c) of the Federal Rules of Civil Procedure. To the extent Plaintiff's claims may be barred by one or more of the affirmative defenses not specifically cited above, BANA incorporates all such defenses set forth in, or contemplated by, Rule 8(c).

**Tenth Affirmative Defense**

BANA reserves the right to assert additional affirmative defenses, or to amend its present defenses, after discovery and as further information becomes available to BANA.

**WHEREFORE**, BANA demands a judgment dismissing the Complaint against it in its entirety, together with the costs and disbursements of this action and such other and further relief as the Court may deem just and proper.

Dated: New York, New York  
October 15, 2019

/s/ Shan Massand  
Shan P. Massand  
MCGUIREWOODS LLP  
1251 Avenue of the Americas, 20<sup>th</sup> Floor  
New York, New York 10020-1104  
Phone: (212) 548-2100  
smassand@mcguirewoods.com

*Attorneys for Defendant Bank of America,  
N.A.*

UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF NEW YORK

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DAVE SHOSTACK,	:	
	:	Case No. 1:19-cv-09162-RA
Plaintiff,	:	
	:	
v.	:	
	:	<b><u>CERTIFICATE OF SERVICE</u></b>
BANK OF AMERICA CORPORATION,	:	
	:	
Defendant.	:	
-----	X	

I hereby certify that on this 15 day of October, 2019, I caused a true and correct copy of the foregoing Answer and Affirmative Defenses by Defendant Bank of America, N.A., and the exhibits annexed thereto, to be duly served upon the following via electronic mail and Federal Express overnight mail, postage prepaid:

Dave Shostack  
4 Suttonwood Dr.  
Commack, New York 11725  
daveshostack@yahoo.com

*Self-Represented Plaintiff*

Dated: New York, New York  
October 15, 2019

/s/ Shan Massand  
Shan P. Massand  
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